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No. 233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

ST. MATTHEWS GAS & ELECTRIC SHOP, INC., - - - - - - - Petitioner,

versus

THE VERKAMP CORPORATION, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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v.

THE VERKAMP CORPORATION, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

JURISDICTION.

1. The judgment of the United States Court of Appeals for the Sixth Circuit, a review of which is here sought, was entered April 15, 1953 (R. 109), and a petition for rehearing was denied May 14, 1953 (R. 117).

2. The statutory provision which is relied upon to sustain the jurisdiction of this Court is Section 1254 of the Federal Judicial Code (28 U. S. C., Section 1254).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner has been adjudged to possess, or be in some way responsible for, two hundred thirty-four (234) cylinders of the Verkamp Corporation.

This judgment was entered without evidence of receipt of the two hundred thirty-four (234) cylinders by petitioner; without the fixing of any responsibility on petitioner for such cylinders, and without requiring the furnishing to petitioner of the cylinder serial numbers of such two hundred thirty-four (234) cylinders, and without knowledge of the number of such cylinders received by respondent by means other than through petitioner.

QUESTIONS PRESENTED.

1. Was the United States Court of Appeals in error in permitting a judgment to stand which was based upon assumption, which was in turn based upon previous assumption?

2. Was the United States Court of Appeals in error in assuming responsibility of petitioner in regard to returning cylinders?

3. Was the United States Court of Appeals in error in rendering judgment without knowledge of the number of cylinders personally received by respondent from the individual users?

4. Was the United States Court of Appeals in error in not requiring the furnishing of serial numbers on the cylinders involved?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The United States Court of Appeals rendered a decision in conflict with the time honored legal concept that a judgment cannot be based upon assumption piled upon assumption.

2. The United States Court of Appeals rendered a verdict which is unsupported by the evidence and which was rendered without requiring respondent to disclose how many cylinders it personally received from the individual customers of petitioner.

3. The United States Court of Appeals in denying petitioner's right to the serial numbers of the cylinders involved denied a basic right long recognized.

PRAYER FOR WRIT.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court to the end that this cause may be reviewed and determined by this Court, and for such other and further relief as to this Court may seem proper.

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v.

THE VERKAMP CORPORATION, - - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURT BELOW.

The original opinion of the United States Court of Appeals for the Sixth Circuit was rendered on April 15, 1953 (R. 109), and is reported in 203 F. 2d 568, and the opinion of that Court on the petition for rehearing was rendered on May 14, 1953 (R. 117), and has not been officially reported.

JURISDICTION.

The jurisdictional statement in the petition for writ of certiorari is adopted.

STATEMENT OF THE CASE.

For a period of thirteen (13) years previous to June 30, 1949, the petitioner (St. Matthews Gas & Electric Shop, Inc.) had purchased from the respondent (Verkamp) liquified petroleum gas for use by petitioner's customers. This gas was purchased from respondent at a price of 3.2¢ per lb. Of this price .7¢, or slightly more than one-fifth, was paid for the use of cylinders furnished to petitioner by respondent. These cylinders were placed with the individual customers of petitioner.

On June 30, 1949, petitioner terminated its purchases of gas from respondent and voluntarily agreed to return to respondent its cylinders when the cylinders became empty and were returned to petitioner by petitioner's customers. This, petitioner has done.

Two years later respondent sued petitioner for use of the cylinders and the return of 305 cylinders which it claimed petitioner still possessed.

The judgment now in effect adjudicates the petitioner to be responsible for 234 cylinders and that petitioner is responsible for interest on certain cylinders at 6% from January 1, 1950. All of this was adjudicated without requiring respondent to furnish the serial numbers of the claimed cylinders and upon evidence which amounts to illogical supposition and the piling of one ill-founded assumption upon another.

The points which petitioner most strongly wants to emphasize are:

1. Compliance by petitioner with its voluntarily assumed agreement to return cylinders when they became empty and were returned by users to petitioner. There was no other obligation.
2. The unfairness of failing to require furnishing of the serial numbers of cylinders.
3. The basing of this complaint upon a known false premise, the W. P. B. report.
4. The failure to account for the cylinders which were returned previous to June 30, 1949.
5. The failure to account for those cylinders picked up by respondent's individual customers.

Point 1 is confirmed by the record (R. 16a, 48a, 40a, 32a and 17a). Point 2 is clear with the explanation that there are literally many thousands such cylinders in this Louisville area, each identified by serial number which is registered with the Bureau of Explosives and such serial number is the standard means of identification in this industry.

The factual explanation of the last three points is briefly:

Point 3 is that respondent's complaint was based upon a WPB Report which, in the words of the person who prepared it, was "between a guess and an estimate" (R. 80a, 81a). This guess and estimate was also based upon previous guesses of two sub-dealers (R. 80a, 81a). There is no certainty and, on the contrary, there is actual uncertainty in the very starting

point (WPB Report) of respondent's complaint. The entire case should fall on this ground alone.

As to point 4, there was absolutely no deduction from complainant's assumed number of cylinders of any cylinders returned previous to June 30, 1949 (R. 37a). Also, for a period of thirty-two months cylinders were received and returned through the Webb Gas Company (R. 69a), an agent of respondent, and no accounting was made for this period.

As to point 5, it is undisputed that respondent had (R. 41a, 79a, 80a), and still to this day does have, an agent in the Louisville area who contacted each of petitioner's customers and who is known to have received cylinders from these customers. No accounting was made of the number of cylinders so received.

SPECIFICATION OF ERRORS.

1. Adjudication of responsibility contrary to agreement to return cylinders when empty and when returned to petitioner by users.
2. The unfairness of failing to require the furnishing of serial numbers of cylinders.
3. The basing of this complaint upon a known false premise.
4. The failure to account for the cylinders which were returned previous to June 30, 1949.
5. The failure to account for those cylinders picked up by the respondent's agent from petitioner's individual customers.

ARGUMENT.

Certain indisputable facts are clear and it is believed that certain definite legal conclusions must follow therefrom. These facts are that petitioner does not have in its possession a single cylinder belonging to respondent. In contrast to this, respondent, through the flimsiest of assumptions and skipping vital elements of proof, says that petitioner does have such cylinders. On the one hand the parties, the Court, and all concerned, admit that petitioner does not have such cylinders. On the other hand, respondent only asserts in a feeble way and with uncertainty as to its own position that petitioner might have such cylinders. This assertion of respondent is made without proof of (1) responsibility, (2) proof of cylinders received through its agent, Webb Gas Company, (3) proof of cylinders received through its agent in Louisville subsequent to July 1, 1949, (4) proof of cylinders returned to it prior to July 1, 1949 (R. 37a), and finally, (5) without proof of any receipted evidence that petitioner received any such number of cylinders in the first place.

Responsibility of petitioner has been assumed contrary to the conduct of the parties for a period of 13 years and contrary to the agreement between the parties themselves (R. 16a, 48a, 40a, 32a and 17a). Evidence of serial numbers of the cylinders has been withheld and vital testimony as to cylinders received directly by respondent, or its agents, have not been produced. The law of this case seems to be well sum-

marized by two decisions by our local jurisdiction. Federal Oil, Gas & Coal Co. v. Maynard, 63 F. Supp. 436-437 (affirmed, 152 Fed. 2d 372).

> "The plaintiff's case fails for want of proof. In order to sustain the position of the plaintiff, the Court must infer too much. Allegations cannot be proved by making inferences from inferences";

and as stated in Sutton, Admr. v. Louisville & Nashville R. R. Co., 168 Ky. 81, 181 S. W. 938, 940,

> "The facts of this case afford no reasonable basis for the numerous presumptions that must be indulged in in order to hold the company liable."

Actually, the facts of this case are much stronger than those relied on in the two cases cited, for there at least it was possible to presume certain facts whereas in the present case there is a total lack of proof, particularly of cylinders returned to respondent through its own agent who individually contacted each of petitioner's customers and both sought and secured such return of cylinders.

Then, too, where the cause of respondent's alleged shortage of cylinders may have resulted from two or more causes, *i. e.*, (1) petitioner may have them, or (2) they may have been returned previous to respondent's starting point of the WPB Report, or (3) they may have been returned through the Webb Gas Company, respondent's agent during a 32-month period, or (4) they may have been received or picked up by re-

spondent's agent in the Louisville area subsequent to July 1, 1949, and it being known that all Louisville area customers were called upon for cylinders by this agent and that such cylinders were received by this agent, then there must be substantial evidence tending to show that the cause for which petitioner would be liable was the actual cause before respondent can recover. Here not only is the evidence negative as to (1), but (2), (3) and (4) are left completely unexplained.

It is known that petitioner does not have such cylinders and it is likewise known that respondent's agent solicited and received such cylinders from the individual users and has not accounted for or made known cylinders so received. As between the various causes for the alleged 234 cylinder shortage not only is the substantial evidence requirement necessary to hold petitioner responsible missing, but also other indisputable causes for such shortage were not negatived by respondent and, in fact, there was an actual withholding of information by respondent as to such other causes for such cylinder shortage.

Respectfully submitted,

HENRY J. BURT, JR.,
Counsel for Petitioner.